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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID R. KNOLL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a cursory private search of voluminous legal documents stolen by an individual who could neither comprehend nor recall what she might have read on those documents can fulfill the Government's "heavy burden" of justifying its own subsequent warrantless review of those same documents for months on end?

2. Whether proffered defenses to the materiality element of a false statements charge which tended to establish that the truth or falsity of the statement in question could not have affected the Government's interests should, constitutionally, have been resolved by a jury rather than the Court below?

LIST OF PARTIES

The parties to the proceeding below were:

David R. Knoll, Defendant-Appellant

Theodore Gleave, Defendant

United States of America, Plaintiff-Appellee

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DAVID R. KNOLL,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David R. Knoll ("Knoll") respectfully requests that this Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit, entered on July 7, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 116 F.3d 994 (2d Cir. 1997) and is reproduced at Petitioner's Appendix ("Pet. App.") A, *infra*, 1a-18a. The order of the Second Circuit denying rehearing is unreported and is reproduced at Pet. App. B,

infra, 19a-20a. A prior decision of the United States Court of Appeals for the Second Circuit rendered in this case, involving some of the same questions at issue herein, is reported at 16 F.3d 1313 (2d Cir. 1994) and is reproduced at Pet. App. C, *infra*, 21a-41a. Finally, the pertinent decision of the United States District Court for the Western District of New York is unreported and is reproduced at Pet. App. D, *infra*, 42a-53a.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was issued on July 7, 1997. A timely petition for rehearing or, in the alternative, suggestion for rehearing *en banc* was denied by the court of appeals on October 3, 1997. *See* Pet. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .."

2. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .."

3. The false statements statute, 18 U.S.C. § 1001, provides:

Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This petition presents two important questions of constitutional, and federal criminal, law for review. The questions arise out of the prosecution of Knoll, and a co-defendant Ted W. Gleave ("Gleave"), for numerous offenses revolving around an alleged conspiracy between Knoll, an attorney, and Gleave, Knoll's client, to hide *Gleave's* assets in Knoll's name. Through the process of acquitting Knoll on forty-two separate charges, the jury found that no such conspiracy existed. What remains, however, is a single count conviction of Knoll for violating 18 U.S.C. § 1001,[1] which had its undisputed genesis in the Government's warrantless review of private papers stolen from Knoll's law office and which had its final affirmation in a judicial -- rather than a jury -- finding of guilt on the element of materiality.

---

[1] The Second Circuit reversed another count on statute of limitation grounds. *See* Pet. App. C at 27a-30a.

A. Facts Relevant To The Fourth Amendment Claim

Over the weekend of June 28, 1986, burglars broke into Knoll's law offices and stole many boxes of documents and tape recordings relating to Knoll's clients, business and personal affairs. Most of those boxes were then taken to the home of Diane Brown where they were reviewed, to some extent, by Brown and Patricia Devany. Shortly thereafter, some of the documents were given to an Assistant United States Attorney ("AUSA") as part of an effort to negotiate a cooperation agreement for Devany's boyfriend, Timothy Ernle, who was incarcerated at the time. The AUSA was not impressed with the import of the documents he received and told the parties to get him more documents if they wanted a deal. Thereafter, Devany brought the AUSA more documents, which included two letters relating to a Cayman Islands bank account – Govt. Exhs. 1A and 1B – that ultimately let to Knoll's prosecution.

These facts raise obvious questions about the degree to which the AUSA's actions may have influenced the private search of Knoll's stolen files. The original Second Circuit panel in this case properly recognized this point in its initial decision when it found that "the AUSA's requests tacitly suggested and condoned further searching, if necessary, through the stolen documents." Pet. App. C at 32a. It thus framed the issue as:

> when the object of the search has been completed. If the object has been realized, the Government cannot later become a party to it. By the same token, it may not expand the scope of an ongoing private search unless it has an independent right to do so.

Id. at 33a. The Court accordingly re-directed the district court to determine "the stage of the search and the state of the files at the time [the AUSA] told [the private parties] 'get me more,'"[2] in light of "the *heavy burden* by the Government in justifying a warrantless search."[3]

Unfortunately, after an evidentiary hearing on remand -- *without ever identifying the object of the search or even discussing the Government's burden* -- the district court determined "that Devany and others had completed the search of the stolen files before" the AUSA's directive. Pet. App. D at 51a. A new Second Circuit panel on a subsequent appeal[4] then similarly affirmed this finding, identifying two witnesses (Brown and Devany) as supporting this conclusion. *See* Pet. App. A at 8a. At face value, though, Brown's testimony was that she:

- did not recall the volume of records brought to her house;

- did not recall receiving any instructions in the review of those records;

---

[2] Pet. App. D at 49a. The original panel decision was rendered by Circuit Judges Cardamone and Mahoney, along with United States District Judge Cedarbaum.

[3] Pet. App. C at 35a (emphasis added). Judge Cardamone cited the Ninth Circuit's decision in *United States v. Licata*, 761 F.2d 537, 543 (9th Cir. 1985) as support for this point.

[4] This new decision was rendered by Circuit Judges Walker and Calabresi. A third member of the panel, Circuit Judge J. Daniel Mahoney, unfortunately passed away prior to the decision of this case.

- did not recall how much time she spent looking through the records; and

- did not recall anything she saw while looking through the records.

(J.A. 647-658).[5] That left only the testimony of Devany to establish "the stage of the search and the state of the files" when the AUSA directed those holding the papers to "bring [him] more."

Devany testified that she could not say whether there were three, six or nine boxes of documents and tapes from Mr. Knoll's office at Brown's house. (J.A. 604).[6] More generically, Devany recalled that she had "tons of records" and "thousands of pieces of paper" before her at the time. (J.A. 587 & 619). The following three questions and answers fairly exemplify Devany's testimony on what she did with those records and papers:

> Q: Did you go through each and every box of records?
>
> A: Yeah.
>
> * * *
>
> Q: Now you mentioned that you were

---

[5] "J.A." refers to the Joint Appendix of testimonial transcripts and other materials filed by the parties in the court below.

[6] The striking lack of specificity in this testimony is attributable to Devany's "terrible" "memory, (J.A. 592), a fact she candidly admitted on the witness stand.

> going through the records and telling Mr. Ernle what was in the records, is that correct?
>
> A: Yes.
>
> Q: So you would read to him from the documents or explain to him what it was?
>
> A: Yes.

(Govt. Br. At 7-8). Devany admitted, however, that she "didn't understand the records" she was looking through, (J.A. 568), and did not "remember a great deal about them." J.A. 483). Devany also conceded that she could not "be positive" and was "not sure" whether she had seen Govt. Exhs. 1A and 1B before. (J.A. 486-487).

Finally, but perhaps most importantly, Devany gave the following testimony at the hearings below:

> Q: After you went to see [the AUSA], did you go through the records again?
>
> A: Yes.

(J.A. 593). Devany then gave Govt. Exhs. 1A and 1B to the AUSA.

B. Facts Relevant To The Sixth Amendment Claim

As Knoll's case proceeded through trial, the parties and the trial court addressed the instructions to be given to the jury to guide its deliberations. "In charging the jury on Count Eight, the district court, in accordance with settled Second Circuit law did not submit to the jury the question of the materiality of the false statement and instructed the

jury that the court determined that 'the facts charged in the indictment are material facts.'" Pet. App. A at 5a (citations omitted). Knoll did not object to this instruction, and not surprisingly in light of it, the jury convicted him of this offense.

On appeal, Knoll challenged the district court's directed verdict against him on the materiality element of this offense as a deprivation of his Sixth Amendment right to trial by jury. The panel recognized, as both parties agreed, "that the district court's failure to submit to the jury the question of the materiality of Gleave's false statement violated Knoll's right to have a jury determine, beyond a reasonable doubt, his guilt as to each element of the charged offense." Pet. App. A at 9a. It then stated that "[t]he only issue on appeal is whether the district court's error requires reversal." *Id.* On the basis of this Court's then-recent decision in *Johnson v. United States*, 117 S. Ct. 1544 (1997), the panel concluded that "because the failure to submit the issue of materiality to the jury did not 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' it need not be corrected under Rule 52(b)." Pet. App. A at 17a - 18a.

In reaching this conclusion, however, the panel wholly failed to consider a potential materiality defense arising from the fact that the Department of Justice had settled its efforts to collect the fine in dispute from Gleave. As Knoll had previously informed the Court:

> [D]uring the very meeting at which the Financial Statement of Debtor form underlying Court Eight was provided to the Department of Justice on behalf of Mr. Knoll's co-defendant, the Government's own witness (Peter Galenda) testified that

> "Mr. Knoll had submitted a proposed payment [plan] of a hundred dollars per month" for his co-defendant to pay off this outstanding fine, and that the Department of Justice accepted that proposal. (Tr. At 3763). A jury could certainly find that the fact that a *settlement* had been reached with respect to the payment of this outstanding fine mooted the "materiality" of information requested by the Government to *collect* it.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH AMENDMENT QUESTION WARRANTS REVIEW TO RESOLVE IMPRECISION AND CONFLICT IN THE LOWER COURTS

A. The Standards For Applying The Private Search Doctrine To Documents Require Clarification

Knoll believes that the panel decision improperly applied the inter-related teachings of *Walter v. United States*, 447 U.S. 649 (1980) and *Lustig v. United States*, 338 U.S. 74 (1949) in resolving this case. Thus, in *Walter*, the Court ruled that a warrantless Government search "may not exceed" the scope of a prior private search (447 U.S. at 657), and in *Lustig*, the Court directed that the scope of a search should be determined through a "functional" evaluation of whether "effective appropriation" has been made of the information being searched. (338 U.S. at 78). When one compares the limited "appropriation" that Patricia Devany effected over the information she privately searched with the detailed manner in which the Government

pored over the same information after receiving it from Devany, a proper application of *Lustig* and *Walter* should only have led to the conclusion that the subsequent Government search far exceeded the scope of the prior private search and, thus, was impermissible absent a warrant. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 120 (1984); *United States v. Donnes*, 947 F.2d 1430, 1435 (10th Cir. 1991); *United States v. Mulder*, 808 F.2d 1346, 1348-49 (9th Cir. 1987).[7]

Under the Fourth Amendment, this Court has made it clear that:

> [A] search is *a functional, not merely a physical, process*. [A] [s]earch *is not completed until effective appropriation*, as part of an uninterrupted transaction, *is made* of illicitly obtained objects for subsequent proof of an offense.

Lustig v. United States, 338 U.S. at 78 (emphases added). Particularly in the context of a search of as many as nine boxes of legal documents by a witness (Devany) who "didn't understand" or "remember" the documents and who had a terrible memory, the "functional" question of "effective appropriation" of the information is not answered by simple referring to the "mere[] . . . physical process" of going through the documents. Yet that is all that the district court looked to, and the panel affirmed as proper, in this case.[8]

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[7] *Accord, State v. Von Bulow*, 475 A.2d 995, 1018 (R.I.), *cert. denied*, 469 U.S. 875 (1984).

[8] Thus, the district court found:

For example, in the proceedings below, the Government conceded that *both* "the name of the bank ('Barclay's Bank International, Ltd., Grand Cayman'), and the name of the account 'Atlantis International, Ltd.'" contained on Govt. Exhs. 1A & 1B were critical to its investigation. Brief for Appellee United States ("Govt. Br.") at 14 n. 7. Yet if Devany was unable to recall these items of information from her limited review of the voluminous documentation stolen from Knoll's law office, even if she could recall other information from those documents, then the Government should not have been entitled to the warrantless review of this information either.[9] [A] partial invasion of privacy cannot automatically justify a total invasion." *Walter*, 447 U.S. at 659 n. 13.

One of the best means of illustrating the parameters of this issue is "the French letter" hypothetical set forth by the Third Circuit in *United States v. Menon*, 24 F.3d 550 (3d Cir. 1994). As that Court described it:

> In the course of [a] search, an officer sees a document written in French lying face up on a table in plain view. His

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> The files had been searched before contact with the government occurred. Devany and others *removed the documents from their files and envelopes* and listened to the tapes.

Pet. App. D at 52a (emphasis added).

[9] As one federal circuit court has recognized, this situation is unlike the typical private search case where the item searched "contain[s] nothing but contraband." *United States v. Allen*, 106 F.3d 695, 698 (6th Cir. 1997).

> glance at the document reveals nothing to him about its contents because he does not understand French and he calls over another officer who speaks French. The second officer glances at the document and thereby obtains a cursory understanding of the meaning of the document. This understanding might not reveal information helpful to the police, but it might instead reveal information about the fully legal, private love affairs of the resident of the house. Surely the glance of the second policeman constitutes at least an incremental invasion of privacy beyond that caused by the glance of the first officer.

24 F.3d at 562. The same principles are fully applicable to the interrelationship between the initial glance of a private citizen searching through documents and the subsequent glance of a law enforcement officer in doing so. Under the hypothetical, if the private citizen searcher did "not understand French," then his initial review of the letter should hardly be available to justify a subsequent warrantless review of the letter by a law enforcement officer who does understand French. In such a circumstance, the subsequent governmental search necessarily "exceed[s] the scope of the private search," *Walter*, 447 U.S. at 657, on comprehension grounds.

Under the Second Circuit's lenient analytical approach to the physical – rather than the functional – process of searching, if a third grader had physically flipped through each of the pages in these boxes, then that private search would have destroyed Knoll's expectations of privacy in those documents and justified a subsequent full-scale search of them by the Government. That would be

nonsensical Fourth Amendment law. Instead, in this type of context, the Government should be required to bear the "heavy burden" of showing that the *substance* of the information conveyed on the documents it desired to search – without a warrant – had been "effective[ly] appropriat[ed]" by the private searcher before it.[10] Since the Government was unable to show that Devany had even actually read, never mind comprehended or understood, the relevant information on Govt. Exhs. 1A and 1B, the resulting fruit of its warrantless search here should have been suppressed.[11]

Two former Justices of this Court have previously expressed the view that this Court should review a case like this one to "settle[]" the "important questions" raised by such warrantless searches through documents by law enforcement authorities. *Crouch v. United States*, 454 U.S. 952, 956

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[10] One ready test for functionally determining the extent of such appropriation is whether the private searcher can testify about the information in question. "[W]e could hardly prevent the [private citizen] who first saw an object from remembering what he or she saw and probably even testifying about it, which means that any additional invasion of privacy from revelation of the information to others is likely to occur anyway." *United States v. Menon*, 24 F.3d at 563. The converse is, of course, true as well.

[11] Before the panel, the Government maintained that our position on this issue imposed too "great[] [a] burden" on it and was "impractical." (Govt. Br. at 43-44). While we do not believe that to be the case, if it is, then it is merely a predictable consequence of the original AUSA's failure to ask any questions at all of Devany – about her private review of these stolen documents -- at the time he so blithely accepted receipt of them from her. *See* Pet. App. C at 32a.

(1981)(White, J., joined by Brennan, J., dissenting from denial of *certiorari*). In that case, during the course of executing a search warrant for drugs and drug paraphernalia, law enforcement agents came across two "bundle[s] of letters in open envelopes" and read them. *Id.* at 953. The Fourth Circuit affirmed the Government's use of the letters as evidence against the defendant on the ground that their seizure was "proper under the plain-view doctrine." *Id.* at 954. In his brief opinion in *Crouch*, Justice White recognized that the Fourth Amendment issue could not be so easily disposed of under plain-view principles because the "incriminating nature [of such documents] is not [immediately] apparent absent some reading of their contents." Id. at 955. He then noted that:

> [a]lthough in each of these cases the incriminating character of the evidence was a function of the written message on the object, there are obvious differences in the quality of the perusal required to perceive that character. Some writings may be so obviously incriminating on their face that even a casual glance would reveal this character; others may require extensive reading.

Id. at 956.[12] Justice White concluded his opinion by finding

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[12] The cases referred to in this quotation from Justice White's opinion were decisions, identified in the opinion, where "a number of Courts of Appeals ha[d] held that a plain-view seizure of certain documents is permissible even though their incriminating nature is not apparent absent some reading of their contents." *Id.* at 955-956 (citing *United States v. Ochs*, et al.). Since that time, at least one court has found that this Court's subsequent decision in *Arizona v. Hicks*, 480 U.S. 321 (1987) requires "courts [to] reanalyze *Ochs* and the other

that the Government's "reading of personal papers" without a warrant "raise[d] extraordinarily important questions," which should be resolved through "plenary consideration" by this Court. *Id.* at 956.[13] That same conclusion is equally

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cases . . . that hold an officer may make a cursory [plain-view] inspection of books or documents to determine their evidentiary value." *United States v. Silva*, 714 F. Supp. 693, 695-696 (S.D.N.Y. 1989). Such concern about the continuing viability of these earlier decisions, of course, only heightens the rationale -- as expressed by Justice White and otherwise -- for this Court to review and clarify the significant legal principles surrounding this issue.

[13] Justice White supported this conclusion with the following:

> To include perusal of letters or documents enclosed in envelopes within the plain-view exception to the warrant requirement may threaten to expand the bounds of legitimate search warrants and legitimate warrantless searches so far as to authorize in effect general searches. Furthermore, petitioners strongly urge the analogy between the facts of this case and those of *Walter v. United States*. . . . Exposure of the contents of the film, which [*Walter*] held to require previous judicial authorization despite the presence of probable cause, is not very different from exposure of the written contents of the letters here.

Id. at 956.

applicable herein.

B. There Is A Conflict Among The Circuits Over Application Of The Government's Burden

Although, the original panel decision in this case cited *United States v. Licata*, *supra*, as support for the "heavy burden" borne by the Government to justify a warrantless search, both the district court on remand and the second panel decision omitted any analysis whatsoever of the Government's burden of proof in this case. Particularly in the circumstances of this case, where the Government's "private" searcher witness could hardly testify to any "facts" at all during the suppression hearings, a proper focus on – and application of – the Government's "heavy burden" burden of proof should have determined this appeal in Mr. Knoll's favor. Ultimately, the Second Circuit's decision can only stand through the application of a forgiving, rather than a strict, standard of proof to the facts of this case.

The "heavy burden" of establishing justification for a warrantless search cannot be met by "speculation about what may or might have happened." *United States v. Licata*, 761 F.2d at 543. Yet "speculation" about the precise scope of the private search here is really all that was adduced by the Government below. By permitting such "speculation" to carry the Government's burden, the decision below stands in stark conflict with *Licata* and the many other federal court decisions like it which properly hold the Government to its Fourth Amendment burden. *Accord, Vale v. Louisiana*, 399 U.S. 30, 34 (1970) ("burden rests on the State to show the existence of such an exceptional situation").

II. THE SIXTH AMENDMENT QUESTION WARRANTS REVIEW TO GUIDE THE LOWER COURTS IN APPLYING *JOHNSON*

A. There Is A Conflict In The Circuits Over The Scope Of Permissible Materiality Defenses

The panel found itself "unable to discern any basis for finding that concealing this account was somehow not material when made to an agency seeking to collect a fine." *Id.* at 17a. As noted above, however, one of the "materiality" defenses proffered by Knoll was to the effect that the agency in question was no longer "seeking to collect" that fine, since the matter of its collection had been settled between the parties. The other proffered materiality defense was that the money in the account at the time that the financial statement form was completed did *not* belong to Gleave, and therefore was irrelevant to the Government's collection effort.[14]

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[14] The panel stated that "Knoll contends that there is an issue of whose money was actually in the account. This exact argument was rejected in *Knoll I.*" Pet. App. A at 17a (citing 16 F.3d at 1322). This conclusion is incorrect. The finding from *Knoll I* cited by the panel related to *Count Three* of the indictment, not *count Eight* which is at issue herein. The charge in Count Three concerned a *July 1982* bankruptcy filing while in Count Eight concerned a *June 1987* Department of Justice financial statement. The proof at trial showed that in the intervening period between the two statements any money that might have been Gleave's in that account was disbursed and the account was replenished with $600,000 of money that had been given to Knoll. (Trial Transcript 5354, 5450-51). The original panel in this case recognized the distinction between the "money-in-the-account" bases for these convictions by

We contend that *Johnson* does not control the result in this case because Knoll had available materiality defenses that Johnson did not have, materiality defenses which other circuits have already recognized as sufficient for jury consideration. While the Second Circuit rebuffed Knoll's defensive concept that the Government's position – economically and strategically -- would not have changed if it had received a truthful answer to the financial statement form question, other federal circuit courts of appeals have recognized the availability of such a materiality defense for jury consideration. *See United States v. Baumgardner*, 85 F.3d 1305, 1309 n.3 (8th Cir. 1996) (materiality defense presented for jury where "government did not introduce evidence to explain specifically how or the extent to which an accurate answer" would have affected it); *United States v. David*, 83 F.2d 638, 648 (4th Cir. 1996)(claim that Government position would not have changed presented materiality defense for jury); *United States v. Dirico*, 78 F.3d 732, 736 (1st Cir. 1996) (taxpayer's claim that truthful information on tax return would have made no monetary difference to the Internal Revenue Service presented materiality defense for jury to consider).[15] There is, thus, a patent conflict extant among the circuit courts on the scope

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citing other grounds for sustaining the sufficiency of the evidence on the later-occurring Count Eight. It, quite literally, had to do so since Knoll was *acquitted* at trial on over 40 counts of the Indictment which turned upon whether he or Gleave owned the $600,000 that later wound up in this account.

[15] Significantly, in its brief to this Court in *Johnson*, the government cited the holdings in two of those cases – *Baumgardner* and *David* – with approval. *See Johnson*, Brief For The United States at 30-31 n. 11.

of permissible materiality defenses.

Knoll's constitutional entitlement to have a jury consider his defenses to this element of the crime with which he was charged surely should not turn upon the fact that his trial was conducted in the Second Circuit (which disapproves of such defenses) rather than the First, Fourth and Eighth Circuits (which approve of them). If the Sixth Amendment's grant of a right to trial by jury is to be fulfilled, it must obviously be done on a uniform, national level.

B. Clarification Is Required On What Standard Of Proof Applies, To Whom, Under *Johnson*

Neither this Court in *Johnson*, nor the panel in this case applying *Johnson*, addressed any standard of proof issues relating to the application of the fourth prong of the plain error test established in *United States v. Olano*, 507 U.S. 725, 732-737 (1993). What standard of proof applies to this test, and who carries the burden of satisfying it, are fundamentally important questions on which the lower courts and litigants need further guidance.[16] Particularly when dealing with the sensitive question of the sufficiency of a potential defense for jury consideration, the requisite standard should be appropriately deferential to the full scope and power of jury review.[17]

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[16] *See Addington v. Texas*, 441 U.S. 418, 423 (1979) (discussing functions of "a standard of proof").

[17] *See, e.g., United States v. Uchimura*, __ F.3d ____, 1997 WL 573130 at * 3 ("Just because a jury usually would agree with such a statement does not mean that a jury must agree with it, as a matter of law. Even if any failure to report income is material in most circumstances, it is not necessarily material in all circumstances.")

In this case, the panel applied this prong of the *Olano* test as if it were Mr. Knoll's burden to establish the likely success of his proffered materiality defenses. This approach to determining the issue was exactly the opposite of what it should have been: namely, the Government's burden to disprove the availability of any such defenses beyond a reasonable doubt. *Compare United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996) (reversing conviction and holding, in similar circumstances, that it was the Government's "burden of persuasion" to establish "lack of prejudice" to defendant); *accord, United States v. Viola*, 35 F.3d 37, 41-43 (2d Cir. 1994).

As the facts of this case amply reveal, resolution of these issues is critical to the fair and proper application of *Johnson*.[18] Putting ourselves in the mindset of a hypothetical reasonable juror, rather than those of lawyers and judges, is it really possible to conclude that there is no "reasonable doubt" that the jury which acquitted Knoll of over 40 counts in this indictment might also have accepted a materiality defense to Count Eight based upon the fact that the money in the account underlying that charge did not belong to Gleave or that the Government had settled its efforts to collect the fine underlying that account. With all due respect, we do not think so and any contrary conclusion gives far too short a shrift to the role of the jury under our Constitution.

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[18] *See also Crawford v. Falcon Drilling*, 1997 U.S. App. LEXIS 35650 at *25-27 (5th Cir. 1997) (relying on grounds of judicial efficiency to distinguish *Johnson*).

CONCLUSION

Knoll is presently incarcerated as a result of this conviction,[19] which was both unconstitutionally begun and finished against him. This is a heartland Fourth Amendment case which raises fundamental issues about the lawful extent to which the private search doctrine can justify warrantless document review by the Government. This is a core Sixth Amendment case which raises systemic issues about the proper application of new Supreme Court precedent in the lower courts. The petition for writ of *certiorari* should be granted to enable this Court to exercise plenary review over each of these important issues.

Respectfully submitted,

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January 1998 Counsel for Petitioner

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[19] On December 29, 1997, after all of his direct appeals were exhausted, Knoll was forced to begin serving his sentence.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 95-1267

UNITED STATES OF AMERICA,

Appellee,

VERSUS

DAVID R. KNOLL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of New York

July 7, 1997

B e f o r e: WALKER and CALABRESI, Circuit Judges.[1]

WALKER, Circuit Judge:

Defendant-appellant David R. Knoll appeals from a decision and order entered April 28, 1995, in the United States District Court for the Western District of New York (William M. Skretny, *Judge*), denying Knoll's motion to suppress evidence introduced against him at trial. The district court issued its decision and order on remand from this court following Knoll's appeal from a judgment entered September 28, 1992, convicting him of one count of aiding and abetting the making of a material false statement to a department of the United States in violation of 18 U.S.C. §§ 1001 and 2. We affirm the district court's evidentiary ruling.

Knoll also challenges the validity of his conviction under *United States v. Gaudin*, 115 S. Ct. 2310 (1995), decided while this appeal was pending, because the jury did not decide the question of materiality in convicting him as *Gaudin* requires. We affirm Knoll's conviction because the failure to submit materiality to the jury did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993).

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[1] The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996, and the appeal is being decided by the remaining two members of the panel, who are in agreement. *See* Local Rule § 0.14(b). Judge Mahoney made a substantial contribution to Parts I and II(A) of this opinion before his death.

I

The facts pertaining to this appeal are described in the district court's opinion denying Knoll's pre-trial motion to suppress, *United States v. Gleave*, 786 F. Supp. 258 (W.D.N.Y. 1992), and in our prior opinion remanding to the district court for further consideration of Knoll's suppression motion, *United States v. Knoll*, 16 F.3d 1313 (2d Cir.) ("*Knoll I*"), *cert. denied*, 513 U.S. 1015 (1994), familiarity with which is assumed.

On February 22, 1990, Knoll was indicted on, among other things, one count of aiding and abetting his co-defendant Ted W. Gleave in making a material false statement to a department of the United States in violation of 18 U.S.C. §§ 1001 and 2 ("Count Eight").[2] Count Eight

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[2] 18 U.S.C. §1001 provided in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined . . . or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1990), *amended by* 18 U.S.C. § 1001 (Supp. 1996). Section 1001 was completely revised in 1996. See False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996).

charged that, in June 1987, Knoll assisted Gleave in the preparation of a financial statement for the United States Department of Justice ("DOJ"), in which Gleave falsely stated that he did not have a savings account. *Knoll I*, 16 F.3d at 1317. In fact, "Gleave and Knoll went together to the Cayman Islands [in 1982] and there opened two bank accounts: a personal account in Gleave's name . . . and a corporate account in the name of soon-to-be-formed [company] Atlantis International, [Ltd.]." *Id.* at 1316.

The government's case against Knoll was based in part on information obtained from files stolen from Knoll's law office. The files were purloined during a burglary orchestrated in June 1986 by Timothy Ernle, a then-incarcerated felon. *Id.* at 1317. Following the burglary, Ernle contacted Assistant United States Attorney ("AUSA") Anthony Bruce and informed AUSA Bruce that Ernle could provide evidence of illegal activity by Knoll. *Id.* Ernle's girlfriend, Patricia Devany, then delivered to AUSA Bruce various documents and tapes that she and Ernle's associate, Diane Brown, had removed from the stolen files. *Id.*; *United States v. Knoll*, No. 90-CR-33S-01, slip op. at 6 (W.D.N.Y. Apr. 28, 1995) ("*Knoll II*"). After receiving the delivery, AUSA Bruce informed Ernle that he was disappointed with the materials and told Ernle he would have to "get [him] more information." *Knoll I*, 16 F.3d at 1320; *Knoll II*, slip op. at 12. Devany then turned over additional documents recovered from the original burglary, including two letters addressed to Barclays Bank International Limited regarding the accounts in the Cayman Islands. These letters ultimately led to the indictments of Knoll and Gleave.

Knoll filed a pre-trial motion to suppress the evidence recovered from his stolen files, arguing that its use violated his Fourth Amendment right to be free from unreasonable searches and seizures. *Gleave*, 786 F. Supp.

at 282. The district court held that Knoll suffered no Fourth Amendment violation because the government did not participate in the burglary. *See id.* at 286-89. The district court also rejected Knoll's argument that the government was required to obtain a search warrant in order to read the documents after they were turned over to the government by Ernle and Devany. *See id.* at 289-91.

The case proceeded to trial. In charging the jury on Count Eight, the district court, in accordance with settled Second Circuit law, *see United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984), overruled by *United States v. Ali*, 68 F.3d 1468, 1475 (2d Cir. 1996), did not submit to the jury the question of the materiality of the false statement and instructed the jury that the court determined that "the facts charged in the indictment are material facts." Knoll did not object to this instruction. The jury convicted Knoll on Count Eight.

Knoll appealed, reasserting the Fourth Amendment claim that he raised in his pre-trial motion to suppress. We agreed with the district court that the burglary of Knoll's office occurred without the involvement of the government, and thus did not implicate the Fourth Amendment. However, we concluded that the search of the stolen files following the burglary was an event separate from the burglary. *See Knoll I*, 16 F.3d at 1319 (noting that the "search" at issue involved "specific rummaging through boxes of files that had earlier been stolen from Knoll's law office"). Because the record left open the possibility that AUSA Bruce requested that Ernle produce additional documents, we were concerned that Ernle and Devany might have been acting as agents for the government when they searched Knoll's files. *Id.* at 1319-20 ("While it appears all the files had already been taken from Knoll's office [when Ernle and AUSA Bruce spoke], it is not clear from the record that they had necessarily been *opened*.").

Accordingly, we remanded, instructing the district court to conduct a hearing to determine whether the object of the search had been completed, and Knoll's reasonable expectation of privacy in the files breached, before AUSA Bruce's request for additional documents. Id. at 1320-21.

On remand, the district court held a hearing and concluded that the search of Knoll's files was completed before AUSA Bruce asked Ernle for more information. Specifically, the district court found that Devany and Brown had searched through each of the stolen files immediately after the burglary, removing documents from envelopes and files, looking at letters, listening to tape recordings, and separating and segregating documents, prior to Ernle's initial contact with AUSA Bruce. *Knoll II*, slip op. at 10-11. The district court therefore concluded that the object of the search had been completed, and Knoll's reasonable expectation of privacy breached, before any governmental involvement in the case, thereby placing the search beyond the purview of the Fourth Amendment. *Id.* at 11-12. Knoll once again appealed.

On June 19, 1995, two months after the district court's decision on the remanded suppression issue and one month after Knoll filed his notice of appeal, the Supreme Court decided *Gaudin*.[3] The Court held in *Gaudin* that the failure to submit the question of materiality to the jury in a § 1001 prosecution violates a defendant's "right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."

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[3] The Supreme Court granted certiorari in *Gaudin* on January 6, 1995. *See* 513 U.S. 1071. The grant of certiorari was four months after the district court's hearing on remand from *Knoll I* and four months before release of its decision on the remanded suppression issue.

Gaudin, 115 S. Ct. at 2320.[4] Knoll raised the *Gaudin* issue in a 28 U.S.C. § 2225 motion filed with the district court on September 11, 1995, *United States v. Knoll*, No. 90-CR-335-01, slip op. at 1 (W.D.N.Y. Jan. 17, 1996) ("*Knoll III*"), and informed this court of his pending § 2255 motion in the brief he filed with this court on September 13, 1995. Br. for Def.-Appellant at 50 n.22. After the district court denied Knoll's § 2255 motion on the ground that a resolution of this appeal with respect to the suppression issue in Knoll's favor would render his motion moot, *see Knoll III*, slip op. at 3, Knoll moved this court for leave to file a supplemental brief raising the *Gaudin* issue. We granted the motion, consolidating Knoll's *Gaudin* claim with his Fourth Amendment claim on appeal.

II

A. Knoll's Fourth Amendment Claim

The district court held an evidentiary hearing and concluded that the search of Knoll's files was completed prior to the government's involvement in this case. This is precisely the inquiry that we requested in *Knoll I*. Accordingly, we will not disturb the district court's conclusion unless it rests upon clearly erroneous factual findings. *See United States v. Brown*, 52 F.3d 415, 420 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 754 (1996).

The district court's findings were based largely on

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[4] The Court in *Gaudin* did not decide whether materiality is an element of a § 1001 offense since the government conceded the point. *Gaudin*, 115 S. Ct. at 2320 (Rehnquist, C.J., concurring) We recently held that materiality is an element of a § 1001 offense. *United States v. Ali*, 68 F.3d 1468 , 1475 (2d Cir. 1995).

its assessment of the credibility of the conflicting testimony of the witnesses. We find no error in the court's decision to discount portions of Ernle's testimony and credit instead the testimony of Devany and Brown. *See United States v. Davis*, 967 F.2d 84, 86 (2d Cir. 1992) ("[T]he trial court is in a unique position to evaluate witnesses' credibility . . . ."). We therefore affirm the district court's conclusion that no Fourth Amendment violation occurred because Ernle, Devany, and Brown were not acting as agents of the government when they searched Knoll's files and Knoll's reasonable expectation of privacy in the files had been defeated before any government involvement.

We also reject Knoll's contention that the government's continued possession of the files after they were turned over to AUSA Bruce constituted an illegal seizure. This argument was not raised in the district court, *see*, Br. of Def.-Appellant at 42 n.20, and thus we review this argument pursuant to Fed. R. Crim. p. 52(b) for plain error. We find no error at all, much less plain error in the government's continued possession of the files. The government was entitled to retain and hold for subsequent use the evidence in its possession as a result of the private search in this case. *See Walter v. United States*, 447 U.S. 649, 656, (1980) ("[T]here was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties.") (plurality opinion of Stevens, J.); *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921).

B. The Claim of Gaudin Error

Knoll challenges the validity of his conviction in light of the failure of the trial judge to submit the question of materiality to the jury as subsequently required by *Gaudin*. This challenge is raised before this court in a

supplemental brief filed after the district court denied his § 2255 motion. In the unique procedural posture of this case, we choose to exercise our discretion and review the *Gaudin* error as if it were raised for the first time on direct appeal instead of on a collateral challenge to his conviction.

The parties agree that the district court's failure to submit to the jury the question of the materiality of Gleave's false statement violated Knoll's right to have a jury determine, beyond a reasonable doubt, his guilt as to each element of the charged offense. *See Gaudin*, 115 S. Ct. at 2320. The only issue on appeal is whether the district court's error requires reversal. The Supreme Court recently addressed this precise issue in *Johnson v. United States*, 117 S. Ct. 1544 (1997), and *Johnson* controls our analysis in this case.

1. Johnson v. United States

In *Johnson*, the Supreme Court addressed the issue of the appropriate standard for reviewing on direct appeal a *Gaudin* error that occurred at trial without objection by the defendant.[5] Johnson was indicted for perjury after testifying falsely before a grand jury as to the source of funds for various real estate purchases. At trial, in accordance with settled Eleventh Circuit law, the district court instructed the jury that the element of materiality was

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[5] The Supreme Court did not decide in *Gaudin* whether, in a case in which the judge decided the issue of materiality, the government should be given the opportunity to show that the error was harmless. Noting that "there is a 'strong presumption' that a constitutional violation will be subject to harmless-error analysis," three concurring Justices in *Gaudin* thought harmless-error analysis should apply. 115 S. Ct. at 2321 (Rehnquist, C.J., concurring).

a question for the judge to decide. Johnson did not object. Before Johnson's appeal, the Supreme Court decided *Gaudin*. On appeal, the Court of Appeals for the Eleventh Circuit reviewed for plain error under Fed. R. Crim P. 52(b)[6] and declined to reverse the conviction because the error did not affect Johnson's "substantial rights." *See Johnson*, 117 S. Ct. at 1547.

The Supreme Court granted certiorari to resolve the circuit split between the Ninth Circuit's *en banc* decision in *United States v. Keys*, 95 F.3d 874, 880 (9th Cir. 1996), *vacated*, 117 S. Ct. 1816 (1997), which held that unpreserved *Gaudin* error is reviewed on direct appeal under Rule 52(a), and the Eleventh Circuit's decision holding that plain error review under Rule 52(b) is the correct standard. *Johnson*, 117 S. Ct. at 1548. The Court held that Rule 52(b) set forth the correct standard. The Court rejected Johnson's argument that the *Gaudin* error was "structural" and therefore outside the scope of Fed. R. Crim. P. 52(b). The Court noted that "Rule [52(b)] by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." *Johnson*, 117 S. Ct. at 1548.

Thus, the Court applied plain error review under Rule 52(b) as outlined in *United States v. Olano*, 507 U.S. 725, 732-37 (1993). Under the *Olano* test, "before an

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[6] Rule 52 states:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson*, 117 S. Ct. at 1549 (quoting *Olano*, 507 U.S. at 732). If these three conditions are met, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotations omitted).

The Court found that there was "error" under the first prong of *Olano* because *Gaudin* applies retroactively on direct review and the trial court erred by failing to submit the question of materiality to the jury. *Johnson*, 117 S. Ct. at 1549. In finding that the second prong of *Olano* was satisfied, the Court rejected the government's argument that "petitioner should have objected to the court's deciding the issue of materiality, even though near-uniform precedent . . . held that course proper" and held that "it is enough that an error be 'plain' at the time of appellate consideration" even if it was not plain at the time of trial. *Johnson*, 117 S. Ct. at 1549.

Under the third prong of *Olano*, the "plain error" must also "affect substantial rights." 507 U.S. at 734. Johnson argued "that if an error is so serious as to defy harmless-error analysis [because it is a 'structural' error], it must also 'affect substantial rights.'" *Johnson*, 117 S. Ct. at 1549. A "structural" error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *see Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997). The Court noted that it has "found structural errors only in a very limited class of cases." *Johnson*, 117 S. Ct. at 1549-50; *see Fulminante*, 499 U.S. at 309-10 (discussing five constitutional errors that are structural); *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (adding a sixth).

The Court declined to resolve whether the error in *Johnson* "fit[] within this limited class of cases" because, even if the *Gaudin* error "affected substantial rights," the error did not satisfy the final requirement of *Olano*. *Johnson*, 117 S. Ct. at 1550.

The final requirement of *Olano* requires an appellate court to determine whether the forfeited error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings before it may exercise its discretion to correct the error." *Id.* (internal quotations omitted). In Johnson's case, the evidence supporting materiality was "overwhelming." *Id.* The grand jury was investigating her boyfriend's alleged narcotics activity and the disposition of the proceeds of that activity, including the possible concealment of such proceeds as real estate investments. Johnson presented no plausible argument that lying about the source of money to improve her home was "somehow not material to the grand jury investigation." *Id.* The Court concluded that there was no basis for finding that the error satisfied the final prong of *Olano*, stating:

> On this record there is no basis for concluding that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." R. Traynor, *The Riddle of Harmless Error* 50 (1970). No. "miscarriage of justice" will result here if we do not notice the error. *Olano*, [507 U.S. at 736], and we decline to do so.

Johnson, 117 S. Ct. at 1550.

2. Applying Johnson to Knoll's Claims

Despite the near identity of the issue in *Johnson* and this appeal, Knoll contends that *Johnson* does not govern our decision. He asserts that under our decision in *United States v. Tillem*, 906 F.2d 814 (2d Cir. 1990), Rule 52(b) plain error review is inappropriate where an objection at trial would have been futile in the face of clearly settled law. He contends that *Johnson* does not address the "question of how Rule 52 should be applied when a 'solid wall of circuit authority' would have made an objection futile at trial." Letter from Attorney Stephen L. Braga filed pursuant to Fed. R. App. P. 28(j) at 4 (June 3, 1997) (quoting *United States v. Keys*, 95 F.3d at 878). Instead, Knoll argues that our review is governed by Rule 52(a). We disagree.

Knoll's argument that *Johnson* does not address whether Rule 52(a) or 52(b) provides the applicable standard when a "solid wall of circuit authority" makes the objection at trial futile is meritless. Knoll relies heavily on the Ninth Circuit's decision in *Keys*. In *Keys*, the Ninth Circuit, sitting *en banc*, addressed the same materiality question at issue in this case and in *Johnson*. *Keys* held that Rule 52(a) governs appellate review of unpreserved *Gaudin* error on direct appeal because "where a defendant faced with a solid wall of authority endorsing a jury instruction acquiesces in or fails to object to it, that defendant is entitled on appeal to the benefit of the new rule without being held to plain error standards." *Keys*, 95 F.3d at 880. Knoll's reliance is misplaced; he fails to acknowledge that the Supreme Court expressly granted certiorari in *Johnson* to resolve the conflict between the Eleventh Circuit's application of Rule 52(b) to *Gaudin* error and the Ninth Circuit's application of Rule 52(a). *Johnson*, 117 S. Ct. at 1548. The Court resolved the conflict in favor of Rule 52(b) and vacated and remanded the judgment in *Keys* for

further consideration in light of *Johnson*. *United States v. Keys*, 117 S. Ct. 1816 (1997). Knoll's argument that *Johnson* is not applicable because the Eleventh Circuit had no rule concerning a defendant's failure to object when faced with a "solid wall of circuit authority" is undercut by the Court's express agreement with the petitioner in Johnson that "the law at the time of trial was settled." *Johnson*, 117 S. Ct. at 1549. Application of Rule 52(a) in this case would conflict both with *Johnson* and governing Second Circuit precedent.

Knoll's assertion that Second Circuit precedent requires review under Rule 52(a) is frivolous. *See United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996) ("[T]his Court can reverse only for 'plain error'" when a defendant did not timely object to *Gaudin* error at a trial occurring prior to the decision in *Gaudin*), *cert. denied*, 117 S. Ct. 1327 (1997); *United States v. Viola*, 35 F.2d 37, 42 (2d Cir. 1994) (holding that Rule 52(b) is applicable when source of plain error is a supervening decision), *cert. denied*, 115 S. Ct. 1270 (1995); *United States v. Malpeso*, No. 96-1237, 1997 WL 289705, at *10 (2d Cir. June 3, 1997) (applying "modified" plain error standard of *Viola* to alleged error under supervening decision in *Bailey v. United States*, 116 S. Ct. 501 (1995)). In particular, Knoll's reliance on our decision in *Tillem* is misplaced. That case does not stand for the proposition that review under Rule 52(a) is appropriate when an objection would be futile at trial. In *Tillem*, "there was no well-settled Circuit rule" and our decisions in the area "were far from consistent." 906 F.2d at 825. Thus, we applied plain error review under Rule 52(b), not ordinary review applicable to preserved error. The other cases relied upon by Knoll are similarly unavailing because they address the issue of whether a change in law applies retroactively or whether an appellant is barred from raising a claim of error for the first time on appeal, not the appropriate standard of review.

See, e.g., Ingber v. Enzor, 841 F.2d 450, 454-55 & n.1 (2d Cir. 1988) (allowing appellant to raise new rule of substantive law on collateral attack); *United States v. Scarpa*, 913 F.2d 993, 1019-20 (2d Cir. 1990) (applying Rule 52(b) in accord with *Tillem*); *United States v. Liguori*, 438 F.2d 663, 665 (2d Cir. 1971) (appellees not barred from raising new rule of law because objection at trial would have been futile). In citing these cases, Knoll confuses the issue of whether an appellant is barred from raising an argument with the issue of what standard of review governs our decision if the argument is not barred.

Knoll argues in the alternative that a "modified" plain error review under Rule 52(b) applies to his case under our decision in *Viola*. *See* 35 F.3d at 42. In *Viola*, we held that "[w]hen a supervening decision alters settled law, the three *Olano* conditions for reviewing plan error under Rule 52(b) [error, plain, affecting substantial rights] still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant." *Id.* There is no need for us to address this argument, however, because we resolve this appeal without reaching possible issues raised by the third prong of *Olano*.

As in *Johnson*, the first two prongs of *Olano* are satisfied in this case. The failure to submit materiality to the jury was "error" and the error is "plain" at the time of appellate consideration in this case. Following the Supreme Court's lead in *Johnson*, we decline to address *Olano's* third prong because even if Knoll satisfies the third prong of *Olano*, Knoll fails to satisfy *Olano's* final requirement that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

This requirement, not expressly set forth in Rule 52(b), "guide[s] the exercise of remedial discretion [by courts of appeal] under Rule 52(b)." *Id.* at 736-37 (discussing requirement and its implicit codification in Rule 52(b)); *see United States v. Young*, 470 U.S. 1, 16 n.14 (1985). This requirement is not discussed in many of our prior cases, *see e.g.*, *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 713 (1996), because a court need not reach the issue unless *Olano's* first three conditions are satisfied. *But cf. Ballistrea*, 101 F.3d at 835.

The facts of this case do not satisfy the final requirement of *Olano*. As we discussed in *Knoll I*, in 1987, DOJ sought to collect an outstanding $6,000 criminal fine owed by Gleave as a result of prior unlawful activity. On June 2, 1987, Knoll and Gleave met with DOJ personnel and provided information to complete a "Financial Statement of Debtor" form. *Knoll I*, 16 F.3d at 1317. The form states that "[t]he principal purpose for gathering this information is to evaluate your capacity to pay the Government's claim or judgment against you." By special interrogatory, the jury identified the following question and answer on the financial form as being false in convicting Knoll on Count Eight of the indictment:

31. Q. Do you have a savings account?

A. No.

We have no doubt that the knowledge that Gleave maintained this account would be material to the DOJ's efforts to collect the fine. We found in *Knoll I* that there was "sufficient proof for the jury to find the Cayman account was an unrevealed savings account." *Knoll I*, 16 F.3d at 1322. The falsely completed financial form reflected that Gleave had no assets to pay the fine. Knoll

raised no plausible argument that concealing a savings account is not a material statement when provided on a form whose express purpose is to determine the availability of assets to satisfy a criminal fine.

Instead of confronting the materiality point directly, Knoll recycles arguments resolved against him in *Knoll I*. Knoll contends that there is an issue of whose money was actually in the account. This exact argument was rejected in *Knoll I*. 16 F.3d at 1322 ("Ample proof existed . . . to overcome appellants' arguments that there was an insufficient connection between Gleave and the funds in the account to charge him with ownership."). Knoll's assertion that the account was not a savings accounts fails because "[n]o good reason is advanced for overturning th[e] jury findings" that "the account was best categorized as a savings account." Id. We do not discuss Knoll's role in the making of the false statement because "[s]ufficient evidence surely existed for the jury to find Knoll guilty as a principal for causing Gleave's false financial statement." *Id.* at 1323. In sum, there is no basis for us to reexamine arguments expressly rejected by a prior panel of this court.

We are unable to discern any basis for finding that concealing this account was somehow not material when made to an agency seeking to collect a fine. Thus, we are unable to conclude that in not submitting the materiality issue to the jury "the error seriously affected the fairness, integrity or public reputation of judicial proceedings."

CONCLUSION

We affirm the district court's ruling that appellant's Fourth Amendment rights were not violated. We also hold that because the failure to submit the issue of materiality to the jury did not "seriously affect the fairness, integrity or public reputation of judicial proceedings" it need not be

corrected under Rule 52(b). The judgment of conviction is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of October, one thousand nine hundred and ninety seven.

USA

Appellee,

v. Dkt. No: 95-1267

Knoll

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant David R. Knoll.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for

rehearing is **DENIED**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1737, 1738

(Argued June 17, 1993 Decided February 14, 1994)

Docket Nos. 92-1580, 92-1586

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UNITED STATES OF AMERICA,

Appellee,

-- v. --

DAVID R. KNOLL and TED W. GLEAVE,

Defendant-Appellants.

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Before: CARDAMONE and MAHONEY, Circuit Judges, and CEDARBAUM, District Judge.[7]

CARDAMONE, Circuit Judge:

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[7] Honorable Miriam Goldman Cedarbaum, United States District Court for the Southern District of New York, sitting by designation.

David R. Knoll and Ted W. Gleave appeal from judgments of conviction entered on September 28, 1992 in the United States District Court for the Western District of New York (Skretny, J.). A jury found Gleave guilty on two counts of bankruptcy fraud in violation of 18 U.S.C. §§ 152 and 2, and found Knoll guilty on one count of violating 18 U.S.C §§ 152 and 2, for assisting Gleave, and one count of violating 18 U.S.C. §§ 1001 and 2, for aiding Gleave in allegedly making false statements to the probation service. The jury acquitted Gleave and Knoll on 42 other charges that were brought against them in a lengthy indictment, and Gleave was acquitted on one other charge brought solely against him. On September 25, 1992 appellants were each sentence to two concurrent 27-month terms of imprisonment. All but three months of each appellant's sentence was suspended and the remainder was to be served on probation. In addition, Gleave was fined $5,000 and his term of imprisonment was to be served in a halfway house.

This appeal requires us to examine whether a search and seizure of a client's papers taken from his lawyer's office may violate the Fourth Amendment to the United States Constitution. That amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Supreme Court teaches that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984), One of the principal questions raised is whether appellants' Fourth Amendment rights were violated by an unlawful intrusion.

BACKGROUND

A. The Cayman Islands Accounts

The parties to this appeal cast the relevant factual background in vastly different lights. We set forth only those facts pertinent to the issues presented. Appellants tell us that defendant Knoll, an attorney, went to the British-owned Cayman Islands, found in the Caribbean, south of Cuba and east of Mexico, in 1981 to establish a relationship with Barclays Bank. Knoll had hoped to open an account for an overseas company, Atlantis International, Ltd., and to use it to become involved in international trade. But due to the prior financial problems he could not obtain a reference letter that Barclays required from a United States bank. Knoll thus sought out Ted Gleave, a friend and former client, to have him establish accounts with Barclays.

The government portrays the Cayman Islands banking connection differently. It says Gleave was the person who initiated overseas banking relationships. It suggested he did so to hide profits allegedly reaped from the sale of gasoline stolen from Ashland Oil, which sought treble damages in a civil RICO suite against him, and that knoll was the lawyer that represented Gleave in the suit.

There is no disagreement that in February 1982 Gleave and Knoll went together to the Cayman Islands and there opened two bank accounts: a personal account in Gleave's name with an opening balance of $9,000 and a corporate account in the name of soon-to-be-formed Atlantis International. They allegedly instructed Barclays that Gleave's personal account was to be closed as soon as Atlantis was formed. Atlantis International was incorporated on March 4, 1982, but for some reason Gleave's private account was never closed. Gleave asserted that though he was the president of the corporation, it was a

nominal title and he resigned the position before his August 1982 filing for individual bankruptcy. The government points out, to the contrary, that in a September 1984 power of attorney issued in connection with the Atlantis International account Gleave was listed as the "principal" of Atlantis.

Knoll deposited roughly $600,000 in the Atlantis account with Barclays, ostensibly without Gleave's knowledge. Appellants claim the money did not belong to Gleave and was not fraudulently procured. According to them this large sum was given to Knoll by one Anthony Korobellis. Although Gleave was the official signatory on the corporate Atlantis International checking account, the money in the account was allegedly managed solely by Knoll, who also managed all transactions in the personal account that remained in Gleave's name. Thus, appellants insist Knoll fully controlled Atlantis International and its Cayman Islands accounts.

B. Gleave's Bankruptcy Petition

Meanwhile, Gleave was a party to a divorce proceeding in Indiana. Knoll, acting as Gleave's attorney, recommended that Gleave file Chapter 11 bankruptcy to protect himself from the possibility that his wife would be awarded his assets thereby foreclosing his ability to satisfy his many creditors. Taking this advice, Gleave filed for bankruptcy on August 2, 1982. Knoll prepared and Gleave signed a "Statement of Financial Affairs" that was filed in the bankruptcy court. Question 1.d. of the Statement asked where and under what names Gleave had conducted business during the last six years. In his response Gleave did not list his relationship with Atlantis International. Question 7.a. then asked what bank accounts he had maintained alone or with others in the last two years; Gleave did not mention either his $9,000 personal account

or the Atlantis corporate account at Barclays Bank.

Count three of the indictment subsequently charged Gleave with concealing property in a bankruptcy proceeding in violation of 18 U.S.C. § 152. In finding Gleave guilty on that count, the jury found his Cayman Islands personal account should have been disclosed on the bankruptcy petition. Count four of the indictment charged Gleave with making a false declaration in a bankruptcy proceeding in violation of 18 U.S.C. §§ 152 and 2; it also charged Knoll with aiding and abetting Gleave to that end, in violation of 18 U.S.C. §§ 152 and 2. The jury found under count four that Gleave should have disclosed that he was "carrying on business" in the name of Atlantis International and that Knoll assisted him in the nondisclosure.

C. Gleave's Financial Statement

As an additional matter related to the current convictions, in June 1987 the U.S. Department of Justice sought to collect an outstanding $6,000 criminal fine imposed on Gleave in the Ashland Oil case. In response to a financial statement questionnaire dated June 2, 1987, Gleave answered "No" to questions asking whether in the last two years he had a savings account or a checking account. The jury convicted Knoll on count eight for aiding and abetting Gleave's false answer to the question regarding a savings account.

Appellants' maintain the jury's verdict raises a question of consistency because Gleave himself was acquitted on count eight. They also stress that the Barclays account was a checking account, not relevant to the question concerning a possible savings account. The government explains this by pointing to Knoll's intrusive role in Gleave's affairs and the extent of Gleave's reliance

on Knoll to complete the financial statement. The government notes that the signature card on the personal account at Barclays listed the account as a "Personal Current Savings/Deposit Account" and contends that the jury properly considered its status.

D. The Burglary of Knoll's Law Office

We come now to the heart of this case: the burglary of attorney Knoll's law office. The government concedes that they first began investigating Knoll and Gleave after obtaining documents stolen from Knoll's law office on the last weekend of June 1986. The burglary of Knoll's law office, planned by one Timothy Ernle while incarcerated in a federal prison on bank robbery charges, was instigated for the purpose of locating incriminating evidence to be used against Knoll, which Ernle could exchange for favorable treatment on the robbery charges he faces. Ernle solicited Albert Hintenberger to break into Knoll's office and steal material. After the break-in was accomplished, Ernle contacted Assistant United States Attorney (AUSA) Anthony Bruce and a delivery of documents and tapes from Knoll's law offices was made to AUSA Bruce by Patricia Devany, Ernle's girlfriend.

Conflicting evidence was presented as to whether Ernle had contacted FBI agents prior to the burglary. The evidence showing earlier contact was discredited by the trial court, which found the government had no prior knowledge of the burglary. AUSA Bruce conceded however that after each of the first two deliveries of documents and tapes by Devany, he told Ernle he was disappointed with the material. As a result, Devany under instructions given her by Ernle brought more material to Bruce. AUSA Bruce and FBI agents eventually discovered two letters in Gleave's files, which had been maintained in Knoll's law office, addressed to Barclay's Bank in the Cayman Islands.

It was through these letters that Barclay's records were obtained by the Department of Justice. The instant prosecution ultimately ensued.

E. The Case

On February 22, 1990 Gleave and Knoll were indicted on 46 counts of conspiracy, bankruptcy fraud, money laundering, interstate transportation of monies obtained by fraud, and making false statements to a department of the United States. The defendants moved to have the documents that were stolen from Knoll's law office suppressed, primarily on the grounds that they were seized in violation of their Fourth Amendment rights. They also moved to dismiss several counts of the indictment, including count four, on the grounds that the counts were barred by the statute of limitations. Judge Skretny denied defendants' motion in a decision reported at *United States v. Gleave*, 786 F.Supp. 258 (W.D.N.Y 1992). After three months of trial, which had commenced on December 3, 1991, Gleave was convicted on counts three and four, and Knoll was convicted on counts four and eight. This appeal followed.

DISCUSSION

I Statute of Limitations.

We discuss first appellants' common count four convictions for making a false declaration in a bankruptcy proceeding. Their convictions on this count must be vacated because the statute of limitations expired with respect to the charges contained in count four before the indictment was brought against them. As an initial matter, the government's assertion that appellants waived this claim by failing to raise it is unpersuasive. Knoll's pretrial motion to dismiss clearly states, "Counts 4 and 5 charging

that alleged false statements made in 1982 and filed with U.S. Bankruptcy Court in Buffalo are totally barred by the 5 year statute of limitations under 18 U.S.C. [§] 3282." An affidavit accompanying the motion spelled out this claim further, and Gleave joined in Knoll's motions. This claim was properly before the district court.

The statute of limitations argument hinges on the fact that the false statements alleged in count four were made in the financial statement signed by Gleave on July 28, 1982. The indictment was not returned against Gleave and Knoll until February 22, 1990, seven and one-half years after the offense. The statue of limitations for federal crimes is generally set at five years unless otherwise explicitly provided. *See* 18 U.S.C. § 3282 (1988). Section 3282 states: "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense . . . unless the indictment is found or the information is instituted within five years . . . after such offense shall have been committed."

The trial court ruled the statute of limitations bar with respect to count four was overcome by 18 U.S.C. § 3284 (1988). *See Gleave*, 786 F.Supp. at 266. Section 3284 extends the beginning of the limitations period for crimes involving the concealment of a debtor's assets. It provides: "The concealment of assets of a debtor . . . shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge." 18 U.S.C. § 3284. Reading that statute literally compels the conclusion that only the concealment of assets -- not the making of a false statement in a bankruptcy proceeding -- is subject to the extended limitations period of 18 U.S.C. § 3284.

Count four charged that Gleave, aided and abetted

by Knoll, "did knowingly and fraudulently and for the purpose of concealing assets of a debtor, make a false declaration under penalty of perjury, in a proceeding under the bankruptcy laws of the United States" in violation of 18 U.S.C. §§ 152 and 2. The count tracks the language of the third paragraph of 18 U.S.C. § 152, which criminalizes knowing and fraudulent false statements made during the course of a bankruptcy proceeding. A separate and distinct statutory provision, the first paragraph in 18 U.S.C § 152, criminalizes concealment of assets. Despite the fact that the purpose of making the false statement in Gleave's case may well have been to conceal assets, the substance of count four charged only the making of a false statement in connection with bankruptcy proceedings. It did not charge either appellant with the offense of concealment of assets. Hence, the extension of the limitations period provided for in § 3284 has no application to count four. In ruling to the contrary the district court erred.

This conclusion accords with the Supreme Court's instructions that criminal statutes of limitations are liberally construed in favor of repose, and that no offense should be construed as continuing a limitations period "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970); *see also United States v. Watson*, 599 F.2d 1149, 1154 (2d Cir.) (exceptions to general statute of limitations are construed strictly), *on reh'g op. revised*, 690 F.2d 15 (2d Cir.1979), *modified sub nom. United States v. Muse*, 633 F.2d 1041, (2d Cir.1980) (en banc), *cert. denied*, 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981).

The general five-year limitations period provided in 18 U.S.C. § 3282 applied to the false statements charged in

count four. Since the document containing those statements was signed in 1982, the five-year limitations period was well past when Knoll and Gleave were indicted in 1990. Hence appellants' convictions on count four must be reversed.

II Search of Client Files, Documents and Tapes Stolen from Knoll's Law Office

We next address Knoll's count eight conviction. That count charged him with aiding and abetting Gleave's false answer to the question of whether Gleave had a savings account in Gleave 1987 Department of Justice financial statement. The information regarding the account was obtained from the files stolen from Knoll's law office. The search of those files presents a close and highly fact-bound question of Fourth Amendment law. Appellants assert the trial court erred in three respects: first, in finding the government did not participate in the burglary; second, in failing to consider appellants' argument that it was at the prosecutor's request that private parties searched through the stolen files after they had been removed from the firm; and third, in finding that once the documents were turned over to the government, no unreasonable search occurred when agents read the documents. There is no basis in the record before us to conclude that the trial court's findings on either the first or third point raised were erroneous.

Conflicting evidence was presented to the district court on the first point, as to when the government had contact with Ernle. We decline to rehash the district court's findings as to credibility or to second-guess its conclusion that an after-the-fact FBI memo -- which dates a discussion between Ernle and an FBI agent concerning Knoll as having occurred before the burglary -- contained an error that was satisfactorily explained. *See Gleave*, 786

F.Supp. at 288. With respect to the third point, the district court properly found the documents turned over to AUSA Bruce had already been searched by private parties and that a search warrant therefore was not required to read them. *See id.* at 291. There was thus no Fourth Amendment violation requiring suppression of the documents and papers taken from Knoll's office on that basis.

It is the second point, which concerns the period between the burglary and the time the stolen documents and tapes were searched by the private parties, that raises a number of troublesome questions and gives us pause. The potential error on this issue derives from what was not addressed, rather than from what was considered. The trial judge believed the Fourth Amendment had not been violated because he found the search "purely private," and applied the rule that evidence procured through a search by private individuals who are not acting as instruments or agents of the government may be used by the government. *See id.* at 285-86 (citing *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed 1048 (1921) and *Coolidge v. New Hampshire*, 403 U.S. 443, 487-88, 91 S.Ct. 2022, 2049, 29 L.Ed.2d 564 (1971)). Because the government was not involved in the burglary, we agree that this initial search was a private one under *Burdeau* and its progeny.

The district court nonetheless relied too heavily on cases where the government knew of or acquiesced in advance to a private search, *see, e.g. United States v. Bennett*, 709 F.2d 803, 805 (2d Cir.1983); *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987), and in doing so it failed to draw a distinction between the burglary and the search, which were, of course, two separate events. The scope of the search here included Devany's, and perhaps others', specific rummaging through boxes of files that had earlier been stolen from Knoll's law office.

The district court applied the wrong legal standard when it focused its attention only on whether the burglars acted as "agents of the government" during the initial search that took place in Knoll's law office. *Gleave*, 786 F.Supp. at 286. During the continuing discussions between Ernle and AUSA Bruce, the prosecutor said he was disappointed at the material turned over to him and expressly told Ernle that he needed more detailed information. While the government emphasizes that the burglary had already been committed, the AUSA's requests tacitly suggested and condoned further searching, if necessary, through the stolen documents. The AUSA himself testified that he told Ernle he would have to "get me more information," and, "you've got to turn more over. If there's stuff out there, you've got to turn it over." Bruce made these statements while aware that there had been a burglary; he testified that Ernle made it "abundantly clear that there were a lot of documents that were available to him."

The district court observed that Devany, "after being instructed which of the materials to deliver to the government, . . . examined the materials and listened to the tape recordings." *Gleave*, 786 F.Supp. at 291. While it appears all the files had already been taken from Knoll's office, it is not clear from the record that they had necessarily been *opened*. AUSA Bruce did not instruct Ernle to cease conducting any further searches, nor did he ask Ernle any questions with respect to the state of the files and whether they had been opened and examined.

Because the trial court did not address AUSA Bruce's comments, its discussion missed the crux of this issue. Although the applicable legal standard looks to whether the person searching and seizing was an agent of the government, *see e.g. United States v. Walther*, 652

F.2d 788, 791 (9th Cir.1981), the standard does not take a solely *ex ante* perspective. The Supreme Court acknowledged in *Lustig v. United States* that "a search is a search by a federal official if he had a hand in it" and that "[s]o long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." 338 U.S. 74, 78-79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949) (plurality opinion). *Lustig* makes clear that it is "immaterial" whether the government originated the idea for a search or joined it while it was in progress. *Id.* at 79, 69 S.Ct. at 1374. The government may become a party to a search through nothing more than tacit approval. *See* 1 Wayne R. LaFave, *Search & Seizure* § 1.8(b), at 180 (2d ed. 1987).

As can be seen, the critical issue is the point in time when the object of the search has been completed. If the object has been realized, the government cannot later become a party to it. By the same token, it may not expand the scope of an ongoing private search unless it has an independent right to do so. *See Walter v. United States*, 447 U.S. 649, 657, 100 S.Ct. 2395, 2402, 65 L.Ed.2d 410 (1980) (plurality opinion). A private party acting as a government agent also may not expand upon a previously private search without running afoul of the Fourth Amendment. Although here the burglary may have been accomplished, that is, the boxes of documents had been stolen from Knoll's office before the government knew of the burglary, the search itself may not have been complete until Devany, upon Ernle's and ultimately AUSA Bruce's request, went through all the stolen files and listened to the tapes to find the material to be turned over to the FBI to be used against Knoll and Gleave. At some point in the ongoing search, Ernle and Devany may have been acting as agents of the government given that AUSA Bruce directed their actions and tacitly approved of whatever measures they took to produce information he wanted from the

contents of the files.

Unfortunately, the record respecting the government's role in this affair is incomplete. Hence, we must remand for further fact-finding since the testimony elicited at the suppression hearing sheds little light on the issue of the stage of the search at which Devany was effectively directed by government agents to continue looking for more information. In addition, further fact-finding to ascertain the state of the files during the development of the investigation against appellants is needed to determine if Knoll's expectation of privacy in the files continued after the burglary.

The Fourth Amendment only protects against a search that intrudes upon an individual's reasonable expectation of privacy. *See Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983). If the files were closed and their contents not apparent from the exterior, the reasonable expectation of privacy continued so long as the files had not been searched before contact with the government occurred. Otherwise, that expectation of privacy would have been frustrated and at an end. *See Jacobsen*, 466 U.S. at 117, 104 S.Ct. at 1658; *see also United States v. Bonfiglio*, 713 F.2d 932, 937 (2d Cir.1983) (clearly labeled cassette tape "had the practical effect of putting the contents of the tape in plain view and therefore reducing the expectation of privacy").

Under Fourth Amendment law a container need not be locked or fastened shut for there to be a legitimate expectation of privacy in its contents, though those facts are emphasized when they exist. *See, e.g., Smith v. Ohio*, 494 U.S. 541, 541-542, 110 S.Ct. 1288, 1289, 108 L.Ed.2d 464 (1990) (brown paper bag is a closed container); *United States v. Donnes*, 947 F.2d 1430, 1435-36 (10th Cir. 1991) (reasonable expectation of privacy in opaque camera lens

case). The Supreme Court has rejected a constitutional distinction between "worthy" and "unworthy" containers and has noted that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross*, 456 U.S. 798, 822-23, 102 S.Ct. 2157, 2171-72, 72 L.Ed.2d 572 (1982). The often-stated requirement that a container need only be "closed" reflects the standard that for there to be a reasonable expectation of privacy, the contents of a container should not be apparent without opening. So long as the opaque file folders were closed or were in closed boxes, and did not reveal their contents, then a reasonable expectation of privacy continued even after they were stolen from Knoll's office.

Ultimately, we think the record has not adequately explored these issues, which we have highlighted to give the district court guidance on remand. We also note the heavy burden borne by the government in justifying warrantless search. *See United States v. Licata*, 761 F.2d 537, 543 (9th Cir. 1985); 4 Wayne R. LaFave, *Search & Seizure* § 11.2(b), at 218 (2d ed. 1987). If the search is found to be invalid, virtually all the key evidence introduced at trial against Knoll might, in retrospect, require suppression as "fruits of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417-18, 9 L.Ed.2d 441 (1963). Accordingly, the case must be remanded for further fact-finding before Knoll's count eight conviction may be ruled upon.

III Gleave's Standing to Assert a Fourth Amendment Violation with Respect to Documents and Tapes Stolen from Knoll

Whether Gleave's count three conviction may be reviewed depends on whether he has standing to object to the search of Knoll's office. A third party has standing to

challenge the constitutionality of a search only when such individual has a "legitimate expectation of privacy" in the premises or items searched. *See Rakas v. Illinois*, 439 U.S. 128, 143, 148-49, 99 S.Ct. 421, 430, 433, 58 L.Ed.2d 387 (1978). The key documents here are two letters addressed to R.C. Sullivan, an officer of Barclays Bank, requesting wire transfers of monies held in the account of Atlantis International. One letter was unsigned and refers only to Knoll; the other was signed by both Knoll and Gleave as "principals" of Atlantis International. These two letters were discovered by the searchers among Knoll's files and turned over the AUSA Bruce who, through the Department of Justice, obtained Atlantis International's banking records in the Cayman Islands and the other evidence introduced at trial.

In general, we believe the protection of the Fourth Amendment extends to those papers that a person leaves with his or her lawyer. *Cf. United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877 (1932) (protection of the Fourth Amendment extends to business offices). This is because the client has a subjective expectation that such papers will be kept private and such expectation is one society recognizes as reasonable. *See Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). But when one party relinquishes control of a letter by sending it to a third party, the reasonableness of the privacy expectation is undermined. *See Ray v. United States Dep't of Justice*, 658 F.2d 608, 611 (8th Cir.1981) (per curiam); *cf. Jacobsen*, 466 U.S. at 114, 104 S.Ct. at 1656 (party maintains expectation of privacy when letter is sealed and in transit).

Here, as an initial matter, the letters are not protected by the attorney-client privilege because their contents relate purely to business transactions. *See United States v. Rosenstein*, 474 F.2d 705, 714 (2d Cir.1973).

More importantly, because Gleave sent the letters to an individual with whom he had no relationship of confidentiality, any legitimate expectation of privacy he may have had in them was abandoned. *See United States v. Miller*, 425 U.S. 435, 442, 96 S.Ct. 1619, 1623, 48 L.Ed.2d 71 (1976) ("'[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.'") (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)). Without an expectation of privacy, Gleave lacks standing to assert a Fourth Amendment violation. *See Rakas*, 439 U.S. at 148-49, 99 S.Ct. at 433. Absent a showing of such a violation, there is no poisonous tree and thus no fruit requiring suppression. *See Wong Sun*, 371 U.S. at 485, 83 S.Ct. at 416. Accordingly, Gleave's count three conviction may not successfully be challenged on Fourth Amendment grounds.

IV Other Claims Regarding the Count Three and Eight Convictions

Gleave and Knoll raise a number of other claims of error concerning their respective count three and eight convictions. Although none of them has merit, we write to dispose of them now in the interests of judicial economy.

A. Sufficiency of the Evidence

Viewing the evidence in the light most favorable to the prosecution, *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), adequate proof was introduced at trial to support the count eight and count three convictions. Such evidence undoubtedly supported Gleave's count three conviction. It charged him with concealing property in a bankruptcy proceeding in violation of 18 U.S.C. § 152. The trial proof showed he opened and continued to use the account at Barclays in his own name. Circumstantial evidence demonstrated some or

all of the money in the account belonged to him. Ample proof existed therefore to overcome appellants' arguments that there was an insufficient connection between Gleave and the funds in the account in Gleave's name to charge him with ownership. The jury accordingly was justified in finding that he had concealed assets from the bankruptcy court in not listing this account on his bankruptcy schedules.

Count eight concerned the financial statement Knoll prepared and Gleave submitted to the Department of Justice. The jury convicted Knoll on count eight for aiding and abetting Gleave's false answer to a question on a Department of Justice financial statement asking whether he had a savings account in the last two years. The name of the account -- listed on a Barclays card as a "Personal Current Savings/Deposit Account" -- f urnished sufficient proof for the jury to find the Cayman account was an unrevealed savings account. The jury had to decide whether the financial statement failed to disclose either a checking or a savings account and it decided that the account was best categorized as a savings account. No good reason is advanced for overturning that jury finding.

Whether Knoll's conviction for aiding and abetting may stand when Gleave was acquitted on count eight is a somewhat closer question. Knoll argues that his conviction may not stand in light of *United States v. Ruffin*, 613 F.2d 408, 412 (2d Cir.1979) (defendant charged with aiding and abetting cannot be convicted if crime not committed). Knoll insists the indictment charged him only with aiding and abetting Gleave under 18 U.S.C § 2(a), not with acting as a principal by causing the offense under 18 U.S.C. § 2(b). We are unable to adopt this proposition. Knoll was here charged not simply as an aider and abettor, but also as a principal. We cannot discern from the record on which role the jury based its conviction, though the government

concedes that he could not be found liable were he charged solely as an aider and abettor. But no variance between the indictment and the proof occurred at trial because count eight of the indictment charged Knoll as both principal and aider and abettor, since that count referred only to 18 U.S.C § 2, without differentiating between its two subsections.

We have held that an indictment charging aiding and abetting may be proven by demonstrating that the aider and abettor was in fact a principal. *See United States v. Oates*, 560 F.2d 45, 55 n. 6 (2d Cir.1977). Other circuits have stated that all charges in an indictment implicitly carry an 18 U.S.C. § 2 charge, *see United States v. Galiffa*, 734 F.2d 306, 312 (7th Cir.1984), and courts have encountered no "difficulty sustaining convictions when the indictment did not specify whether the defendant was the aider and abettor or the principal." *United States v. Bryan*, 483 F.2d 88, 95 (3d Cir.1973). Hence, the proof at trial properly showed Knoll acted as a principal, and did not constitute a variance from the indictment.

Sufficient evidence surely existed for the jury to find Knoll guilty as a principal for causing Gleave's false financial statement. The proof reflected Gleave's reliance on Knoll and Knoll's role in preparing the financial statement. Since a person may be convicted as a principal for causing an innocent intermediary to violate the law, *see United States v. Tannenbaum*, 934 F.2d 8, 14 (2d Cir.1991), Knoll's count eight conviction as an aider and abettor was sufficiently supported.

B. Prosecutorial Comments

The prosecutor did not improperly comment on Gleave's failure to testify. The test governing whether a prosecutor's statements amount to an improper comment on

the accused's silence in violation of the Fifth Amendment looks at the statements in context and examines whether they "naturally and necessarily" would be interpreted by the jury as a comment on the defendant's failure to testify. *See United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977). We disagree with the government that the first remark -- that Ted Gleave was "[t]he only person that knows how the $600,000 got into the Cayman Island bank account" -- was a fair response to the defense's claim that the government could not show the origin of the $600,000. The prosecutor's other statement observed that Gleave was "unwilling to admit he owns" certain property. Since the comment referred to Gleave's unwillingness to admit ownership prior to trial, viewed in context the remark is not a comment on Gleave's failure to testify at trial. In addition, appellants have not shown substantial prejudice as a result of the prosecutor's statements, *see United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir.1981) (per curiam), *cert. denied*, 456 U.S. 989, 73 L.Ed.2d 1284 (1982), a particularly heavy burden inasmuch as the trial court gave a curative instruction as part of its charge.

C. Gleave's Prior Conviction

Gleave's prior conviction in the Ashland case was properly admitted since he acknowledged profiting by over $100,000 from the sale of stolen gasoline in that case. The conviction related to his possible motive for committing the crimes charged in the indictment. *See* Fed.R.Evid. 404(b). Judge Skretny did not abuse his discretion in admitting the evidence. *See United States v. Gilan*, 967 F.2d 776, 780 (2d Cir.1992) (clear abuse of discretion required to overturn 404(b) admissibility decisions).

D. Right to Counsel

Knoll, who represented himself at trial, claims that he was denied his Sixth Amendment right to counsel. We disagree. The trial judge advised Knoll on numerous instances of his right to counsel and the problems he might encounter by proceeding *pro se*. While Knoll at one point stated to the trial court that when he was testifying as a witness he might decide to have "somebody come in from time to time like a cameo role to ask me questions in areas where it doesn't fit with me asking and answering," this did not constitute a request for counsel. Knoll himself stated he was merely "telegraphing" his thoughts to the court. The trial court had no obligation to grant Knoll counsel *sua sponte* in a trial where attorney Knoll did not request it.

E. Speedy Trial

We also find the Speedy Trial Act was not violated. *See* 18 U.S.C. § 3161 (1988) (requiring the government to bring criminal defendants to trial within 70 days of their first appearance before a judicial office or the filing of an indictment, whichever is later). Excluding relevant time periods pursuant to § 3161(h), many of which were excluded at appellants' requests, both appellants were brought to trial within 70 days.

CONCLUSION

Accordingly, appellants' count four convictions are reversed. With respect to Knoll's count eight conviction, we remanded the case to the district court for it to conduct a hearing consistent with the opinion to resolve issues of fact relevant to the Fourth Amendment suppression issue. Gleave's count three conviction is affirmed. We have carefully considered the remaining arguments appellants raise and find them to be without merit.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v. **DECISION AND ORDER**
90-CR-33S-01

DAVID R. KNOLL,

Defendant.

INTRODUCTION

Before this Court on remand from the United States Court of Appeals for the Second Circuit is defendant's motion to suppress documents obtained from files stolen from his law office in June 1986. Defendant moved to have the documents suppressed before trial on the grounds that the government obtained them in violation of his Fourth Amendment rights. This Court denied his motion. *United States v. Gleave*, 786 F. Supp. 258 (W.D.N.Y. 1992).

A jury found defendant guilty on one count of violating 18 U.S.C. §§ 152 and 2 (Count Eight) and one count of violating 18 U.S.C. §§ 1001 and 2 (Count Four). On September 27, 1992, defendant was sentenced to two concurrent twenty-seven-month terms of imprisonment, all but three months of which were suspended. A judgment of conviction was entered against defendant on September 28, 1992. On appeal, the Second Circuit reversed defendant's Count Four conviction. The Second Circuit remanded the

case with respect to the Count Eight conviction for further fact-finding on whether the government violated defendant's Fourth Amendment rights. *United States v. Knoll*, 16 F.3d 1313 (2d Cir. 1994). A post-trial hearing was held before this Court on August 28, 1994, and August 29, 1994, to elicit testimony on the issues remanded by the Second Circuit. Following the hearing, the government submitted a post-trial hearing memorandum of law containing proposed findings and conclusions. Defendant filed a memorandum of law in response, to which the government filed a reply.

For the reasons set forth below, based on the testimony presented on the issues remanded by the Second Circuit, defendant's motion to suppress evidence must be denied.

DISCUSSION

In denying defendant's pretrial motion to suppress, the Court found that the search for the stolen materials was "purely private." *Gleave*, 786 F. Supp. at 285-86. The Second Circuit remanded this case for further fact-finding on whether the government became a party to the search before it was complete. *Knoll*, 16 F.3d at 1319-21.

A. The Issues

The facts surrounding defendant's suppression motion appear in *Gleave*, 786 F. Supp. at 283-84, and *Knoll*, 16 F.3d at 1317. The Second Circuit affirmed this Court's prior determination that the government did not participate in the burglary of defendant's office. *Id.* Defendant himself testified that he is now "convinced beyond any doubt" that the government was not actually involved in the burglary. (Tr. 340.)
The issue on remand is whether the government was

involved in the search of the records.

The Second Circuit framed the issues for remand as follows. The search of defendant's files was an event separate from the burglary of his office. The search included "specific rummaging through boxes of files that had earlier been stolen from Knoll's law office."" *Knoll*, 16 F.3d at 1319.

Timothy Ernle, who had arranged the break-in, sought to exchange incriminating documents for favorable treatment on separate bank robbery charges he faced. Ernle contacted Assistant United States Attorney ("AUSA") Anthony Bruce from the Erie County Holding Center and had Patricia Devany deliver certain documents to AUSA Bruce. Bruce told Ernle in later discussions between them that Ernle would have to "get me more information," and "you've got to turn more over. If there's stuff out there, you've got to turn it over." Though the burglary had already taken place, "the AUSA's requests tacitly suggested and condoned further searching" of the records, "if necessary." *Id.* at 1391-20.

The Second Circuit framed two related issues for further fact-finding on remand. The first is whether "[a]t some point in the ongoing search, Ernle and Devany may have been acting as agents of the government given that AUSA Bruce directed their actions and tacitly approved of whatever measures they took to produce information he wanted from the contents of the files." *Id.* at 1320. This issue, the Second Circuit explained, required fact-finding on "the stage of the search at which Devany was effectively directed by government agents to continue looking for more information." *Id.*

The second issue is whether defendant's "expectation of privacy in the files continued after the burglary." *Id.* This issue required fact-finding "to ascertain the state of the files during the development of the investigation" against defendant. *Id.* "If the files were closed, and their contents not apparent from the exterior, the reasonable expectation of privacy continued so long as the files had not been searched before contact with the government occurred." *Id.*

B. **The Testimony**

Testimony was heard from five witnesses: Patricia Devany, Diane Brown, AUSA Anthony Bruce, Timothy Ernle, and David Knoll. The hearing explored the stage of the search and the state of the files at the time the government lent tacit approval to the measures Ernle and others took to produce the information.

1. **Patricia Devany**

Patricia Devany testified that after the burglary Ernle directed her to pick up the stolen records from Albert Hintenberger, known as "Chief." (Tr. at 14.) Devany picked up three or four boxes of records, which she took to the house of Ernle's sister, Diane Brown. (Tr. 15.) Diane Brown lived there with Mike Brown. (Tr. 15.) The records were kept on the dining room table in their house. (Tr. 16.) Devany testified that they went through the records "right away." (Tr. 18.) Ernle was on a speaker phone guiding her, Diane Brown, and Mike Brown, through the records. (Tr. 16.) When they started, the records "[l]ooked like a bunch of files being thrown in a box. I mean it was ruffled, just not orderly in any way, shape or form." (Tr. 31.) They went through "each and every box of records" for "hours at a time" though Devany

could not remember on how may occasions. (Tr. 18.) As Devany went through the records, she would tell Ernle what they were. (Tr. 22.) Ernle would tell Devany "if it was important or not." (Tr. 22.) If Ernle said it was important, Devany would "put it in one box." (Tr. 23-24.) Devany spent other time going through the records without Ernle on the phone, separating duplicates and "stuff that you could see was not important or whatever." (Tr. 25.)

In going through the records, Devany removed documents from envelopes and files. (Tr. 31.) She told Ernle what was contained in the papers. (Tr. 31, 38.) She listened to tape recordings. (Tr. 87-88.) With respect to the two letters addressed to Barclays Bank in the Cayman Islands, the letters used by the government, Devany testified only that "[t]here were a lot of records, tons of records, and this does look familiar that it came from the records, yeah." (Tr. 38.)

There came a time when Ernle asked Devany to deliver records to AUSA Bruce. (Tr. 40.) Devany testified that she, Diane Brown, and Mike Brown had been through the records before Devany went to see Bruce. (Tr. 43.) Ernle told Devany which papers to take. (Tr. 41.) According to Devany, "[t]hat's why we went through the boxes." (Tr. 41.)

2. **Diane Brown**

Diane Brown's testimony was materially consistent with Devany's. She confirmed that Devany brought the records to her house and that she, Devany and Mike Brown went through them. (Tr. 96,97.) Ernle communicated by phone. (Tr. 98.) Diane Brown recalled looking through letters in envelopes and listening to tapes. (Tr. 104, 110.) She testified that they went through the records right after they were brought to her house. (Tr. 109-10.) In fact, they

went through them the day Devany brought them over and the day after. (Tr. 109.) While Diane Brown testified that the records were at her house "for a couple weeks," she recalled going through them "just in the beginning." (Tr. 116.)

3. **Anthony Bruce**

AUSA Bruce testified that he had two, perhaps three, conversations with Ernle before receiving any records. (Tr. 127.) In the first conversation, in early August 1986, Ernle told Bruce that he was in the holding center and had access to the records. (Tr. 126, 128.) Ernle asked Bruce if he was interested in the records in exchange for some sort of quid pro quo on Ernle's bank robbery charge. (Tr. 128.) Bruce responded that he "would be interested" but "would not do anything for him in a sight-unseen type situation." (Tr. 129.)

The second conversation took place between two and four days later. (Tr. 129.) Ernle told Bruce that he had put together a sampling of documents that Devany would deliver. (Tr. 130.) If Bruce liked the samples, Ernle would bring him the rest. (Tr. 193, 197.) Devany then called Bruce and arranged to deliver the records. (Tr. 130.) She delivered a manilla file folder containing ten to twenty sheets of paper. (Tr. 131.) When Ernle called Bruce not long after, Bruce told him that the documents delivered were "really of no value." (Tr. 132.) Ernle said that he had more documents (Tr. 134), and at that point Bruce told him, "[i]f there's stuff out there, you've got to turn it over." (Tr. 136.) Bruce testified that he meant, "[i]f there was anything in Ernle's possession or available to Ernle . . . that it would in fact be useful in bringing or aiding a criminal investigation, that that was what he had to turn over to get this deal that he kept making reference to." (Tr. 135.)

A second and third production of records followed. In each case, Devany delivered a box of records to Bruce. (Tr. 140.) The records, according to Bruce, were "disheveled." "They were kind of everywhere. There were envelopes, there were records sitting out by themselves, not in an envelope. And there didn't seem to be any rhyme or reason to them." (Tr. 143.) "To describe the box as a mess I think is being almost charitable. Everything was in there kind of haphazard." (Tr. 187.) Bruce did not have to unseal any envelopes when he examined the records. (Tr. 188.) Bruce recalled that one of the Cayman Island letters was "off to the right-hand side of the box sticking out about halfway on its own." (Tr. 144) He did not recall where the other letter was located. (Tr. 144.)

4. **Timothy Ernle**

Ernle testified that the initial "sample" he provided Bruce was not culled from all the documents to which he had access. The first delivery, he claimed, was only eight to ten names from one box.

According to Ernle, he directed the others by telephone through only one box marked "billing" the first day after the burglary. (Tr. 291, 296.) The first delivery to Bruce, made a day or two after the burglary (Tr. 232, 295), was eight to ten names from that box. (Tr. 229-30, 295.) Ernle testified that before the time Bruce told him "get me more," he and the others had only gone through the billing records. (Tr. 325.) After Bruce told him to "get me more," they went through some other boxes within a few days. (Tr. 330.) They emptied out those boxes, and Devany and Diane Brown would read the records over the phone. Ernle would determine whether it was in or out. (Tr. 238.) An additional delivery of documents was made

to Bruce seven to ten days after the first. (Tr. 240.) A third delivery was made a week or two after the second. (Tr. 241.)

5. **David Knoll**

David Knoll, the defendant in this case, testified as to what was stolen from his office and how the files were maintained. Knoll claimed only to "know the condition of the records as they were in the office," not "the condition once they were in the burglar's hands." (Tr. 344.)

C. **Findings of Fact**

As already explained, the Second Circuit remanded this case for further fact-finding on the stage of the search and the state of the files at the time Bruce told Ernle "get me more."

According to Ernle, he and the others had only searched the billing box at the time Bruce told him to "get me more." This Court specifically finds, however, that Ernle's testimony with respect to the sequence of the search and deliveries is not credible. Ernle was considerably less at ease answering questions in this regard than in his other testimony. He appeared troubled, struggled answering questions, tipped his head, rubbed his eyes, squinted, looked away, and at times closed his eyes. This was in sharp contrast to his otherwise confident, unhesitant, and articulate manner.

His testimony moreover was inconsistent and contradictory. Albert Hintenberger burglarized defendant's office on June 29, 1986. Ernle testified that Devany delivered the "sample" to AUSA Bruce a day or two after the burglary. Ernle further testified that Devany made the second delivery seven to ten days after the first, and the

third delivery a week or two after the second. Ernle was "fairly certain" that Daniel Nowak, who initially told Ernle what materials defendant might have in his office, was on the galley at the holding center when Devany made the third delivery. Ernle acknowledged that Nowak was off the galley after July 3, 1986. At one point Ernle testified that Bruce "had gotten all I was going to give him" before July 3, 1986.

These dates do not add up. The substance of Ernle's testimony is that the time from the burglary to the third delivery was, on the one hand, fifteen to twenty-six days, and, on the other, four days at most. Though Ernle professed he was not good with dates, he did claim to remember time frames. (Tr. 256-57.) His testimony, however, provides two vastly different time frames -- a few days as compared with a few weeks. Coupled with his demeanor on the stand, Ernle's inconsistent testimony concerning the sequence of the search and delivery is not credible.

The events related by Devany and Diane Brown, on the other hand, in conjunction with the testimony of AUSA Bruce, are more consistent, credible, and probative of the issues before this Court. The burglary took place on June 29, 1986. Devany picked up the records within a day and brought them to Diane Brown's house. They went through the records "right away," the day they were brought over and the day after. They went through "each and every" box of records, telling Ernle what they were. Devany separated duplicates and what she could see was unimportant on her own. She put what Ernle told her was important in a separate box. In going through the records, Devany removed documents from envelopes and files and listened to tape recordings. Diane Brown also looked through letters in envelopes and listened to tapes.

AUSA Bruce received the first call from Ernie around August 1, 1986. This time frame is credible based on Bruce's reconstruction of events at the first suppression hearing from the time he turned the records over to Special Agent Michael Vincent of the Federal Bureau of Investigation. It is also consistent with Devany's testimony that she, Diane Brown, and Mike Brown had been through the records before Devany went to see Bruce. Before Bruce ever told Ernie to "get me more," the records in "each and every box" had been removed from envelopes and files and reviewed with Ernie. According to Devany, "[t]hat's why we went through the boxes." When Bruce received the records, they were "disheveled," "haphazard," and a "mess."

On this basis, this Court finds that Devany and others had completed the search of the stolen files before Ernie called Bruce and before Bruce ever may have "tacitly suggested and condoned further searching."

D. Conclusions of Law

Since private individuals stole the files and completed the object of the search before contacting AUSA Bruce, the government did not violate defendant's Fourth Amendment rights.

The first issue remanded by the Second Circuit is whether "Ernie and Devany may have been acting as agents of the government given that AUSA Bruce directed their actions and tacitly approved of whatever measures they took to produce information he wanted from the contents of the files." *Knoll*, 16 F.3d at 1320. Ernie and Devany did not act as agents of the government. The object of the search was complete before the government was contacted. "If the object has been realized, the government cannot later become a party to it." *Id.*

The second issue is whether Knoll's expectation of privacy in the files continued after the burglary. The testimony elicited at the post-trial suppression hearing demonstrates that defendant's expectation of privacy in the files was frustrated before contact with the government occurred. As the Second Circuit stated, "[i]f the files were closed and their contents not apparent from the exterior, the reasonable expectation of privacy continued so long as the files had not been searched before contact with the government occurred. Otherwise, that expectation of privacy would have been frustrated and at an end." *Id.* at 1320.

The files had been searched before contact with the government occurred. Devany and others removed the documents from their files and envelopes and listened to the tapes. Defendant's expectation of privacy was thus frustrated and at an end before AUSA Bruce ever told Ernle to "get me more."

CONCLUSION

For the reasons set forth above, based on the testimony presented on the issues remanded by the Second Circuit, this Court must deny defendant's motion to suppress evidence.

ORDER

IT HEREBY IS ORDERED, that defendant's motion to suppress evidence is DENIED.

FURTHER, that the Clerk of this Court is directed to forward a copy of this Decision and Order to the Clerk of the Court for the United States Court of Appeals for the Second Circuit.

SO ORDERED.

Dated: April 28, 1995
Buffalo, New York

/S/
WILLIAM M. SKRETNY
United States District Judge